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SUPREME COURT OF THE UNITED STATES

JULY TERM, 1973

No. 73-70

THE STATE OF MONTANA, Acting by and through the Montana Department of Institutions,

Petitioner,

-vs-

ROBERT ELMER GLICK, CLARA KATHERINE GLICK, IRENE BURRIS, LORRAINE GOOSELAW, NETTIE ROSLING, EVERT B. ROSLING, STEWART A. MOORE, MARGARET E. MOORE, DONALD LEROY MANTHA, JANE F. MANTHA, AHTI HANNI, MINNIE HANNI, CANDACE L. BRADLEY, KENNETH L. BRADLEY, LAWRENCE C. OLSON, MARGARET H. OLSON, DORIS T. BRAY, WILLIAM K. BRAY, BETTY BARKELL, HAZEL V. VOSS, IONA PARKER, HELEN V. STOKINA, GEORGIA LASLOVICH, HARRY L. HELTON, JR., ROBERT PRIVRATSKY and JESSIE T. CARNEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF MONTANA

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IN THE
SUPREME COURT OF THE UNITED STATES

July Term, 1973

No. _____

THE STATE OF MONTANA, Acting by and through the Montana Department of Institutions,

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-vs-

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF MONTANA

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of Montana entered herein on April 9, 1973.

OPINION BELOW

The opinion of the Supreme Court of the State of Montana is officially reported. It appears in 509 P.(2d) 1, presently in the advance sheets. A copy of said Opinion is found in Appendix A.

JURISDICTION

The decision and opinion of the Supreme Court of the State of Montana was entered on April 9, 1973. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

(1) Did the court err in computing "regular rate of pay" under the Fair Labor Standards Act and its interpretation thereof?

(2) Is the interpretation and applicability affected by the existence of Article XVIII, Section 4, Constitution of Montana, and Section 41-1121, R.C.M. 1947, as amended?

CONSTITUTIONAL PROVISIONS INVOLVED
(State of Montana)
Article XVIII, Section 4

"A period of eight hours shall constitute a day's work in all industries, occupations, undertakings and employments, except farming and stock-raising; provided, however, that the legislative assembly may by law reduce the number of hours constituting a day's work whenever in its opinion a reduction will better promote the general welfare, but it shall have no authority to increase the number of hours constituting a day's work beyond that herein provided."

STATUTES AND RULES INVOLVED

Fair Labor Standards Act of 1938, as amended.

29 U.S.C., Section 207(a)(1):

> "Except as otherwise provided in this Section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty (40) hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1½ times the regular rate at which he is employed; and . . ."

29 U.S.C., Section 203(s)(4); Public Law 89-601, Section 102(b):

> "Effective February 1, 1967, expanded the employer 'to include a state or a political subdivision thereof' with respect to employees in a hospital, institution or school referred to in subsection (R) of this section or carrier referred to in such sentence."

29 C.F.R., Section 778.114:

> "Fixed salary for fluctuating hours.
> (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for

working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement."

Section 41-1121, R.C.M. 1947:

"Hours of labor for state and municipal governments, mines, mills, smelters. A period of eight hours shall constitute a day's work in all works and undertakings carried on or aided by any municipal, county, or state government, first class school districts, and on all contracts let by them, and for all janitors, except in courthouses of sixth and seventh class counties, engineers, firemen, caretakers, custodians and laborers employed in or about any buildings, works, or grounds used or occupied for any purpose by any municipal, county, or state governments, school districts of first class, and in mills and smelters for the

treatment of ores, and in underground mines, and in the washing, reducing and treatment of coal; except in cases of emergency when life or property are in imminent danger. Provided, that for fire fighters in cities of the first and second class, a work week shall be a period of a maximum of forty hours during a five day week."

STATEMENT OF THE CASE

Plaintiffs, in the court below, were employees of Montana Children's Center, an institution administered by the defendant, the State of Montana, through its Department of Institutions. The complaint or complaints were filed June 25, 1969, on behalf of twenty-six employees, for the purposes of recovering amounts of wages and overtime under the Federal Fair Labor Standards Act. The complaint sought recovery for overtime due each plaintiff who was employed between February 1, 1967, and January 31, 1969. Amendment 29 U.S.C., 203(s)(4) was effective February 1, 1967, and implemented by the defendant on February 1, 1969. The federal act required payment of one and one-half times the regular rate of pay for all hours worked in a workweek in excess of forty-four from February 1, 1967, to January 31, 1968, and for all hours in excess of forty-two for the period February 1, 1968, to January 31, 1969. On June 9, 1970, a motion for summary judgment, limited to the question as to whether or not, as a matter of law, the plaintiffs were entitled to the benefits of the Fair Labor Standards Act, was granted. That order and judgment was appealed by the petitioner to the Supreme Court of the State of Montana. Judgment was affirmed April 9, 1971. There remained for consideration, the question of what the various plaintiffs were to recover under the Fair Labor Standards Act as it applied to them. The various plaintiffs averaged 65 to 75 hours a week.

The trial court adopted a formula pursuant to its interpreta-

tion of the Fair Labor Standards Act. It determined the monthly wage, multiplied by 12, then divided by 52, to obtain the weekly wage of the employee. Thereafter, it took that weekly wage, divided it by 40 hours for a workweek to determine the "regular rate of pay." Using that determination, and applying the sanctions of 29 U.S.C. 216(b), the trial court arrived at a judgment of $489,239.26.

On appeal, the Montana Supreme Court struck the penalty provisions, and remanded the matter to the trial court for recomputation of total hours of work and attorneys' fees, not inconsistent with the opinion. It retained the trial court formula for the determination of the regular rate of pay.

Petitioner at all levels argued that the "regular rate of pay" should be the actual number of hours worked per week, divided into the weekly wage, as opposed to a 40 hour week divisor. Respondents claim that the application of Article XVIII, Sec. 4, of the Montana Constitution, and Section 41-1121, Revised Codes of Montana, 1947, as amended, compel the use of the smaller divisor. Petitioner contended that insofar as an interpretation of the Fair Labor Standards Act is concerned, and in light of the regulations of 29 C.F.R., Section 778.114, that neither the Montana Constitution nor its statutes control a contrary interpretation for the determination of the "regular rate of pay."

The petitioner first raised the question relative to the determination of the regular rate of pay in its proposed findings of fact and conclusions of law submitted to the trial court, and attached hereto as Appendix B, with reference particularly to proposed Findings Nos. 19, 20 and 21 and proposed Conclusions Nos. 2 and 4, submitted January 21, 1972.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the State of Montana, in *Glick, et al., v. The State of Montana, acting by and through the Montana Department of Institutions,* 157 Mont. 204, 485 P.(2d) 42, de-

termined that the employees of the Montana Children's Center were subject to the protections of the Fair Labor Standards Act of 1938, as amended, and entitled to the benefits that might flow therefrom. In so doing, the respondents proceeded in obtaining those benefits and protections not under any state law or constitutional provision, but in accordance with the Fair Labor Standards Act. The petitioner, likewise, is entitled to the protections of the act, as well as the interpretations thereof opined by the federal courts, including the decisions of the United States Supreme Court. The opinion of the Montana Supreme Court is at odds with the interpretations of the federal courts. If that opinion is allowed to stand, the taxpayers of the State of Montana will suffer in this particular case alone, the loss of approximately $85,000.00. The decision will create a precedent whereby the State of Montana, in the interpretation of the Fair Labor Standards Act, will go one way. The rest of the nation would and should be required to follow the interpretations of this Court, as pronounced in *Overnight Transportation Co., Inc. v. Missel*, 316 U.S. 572.

The Montana constitutional statutory provisions were not adopted or enacted in contemplation of the requirements of the Fair Labor Standards Act. The maximum workweek, by definition, does not limit the number of hours an employee may work. It merely designates at what point in time during the workweek overtime must be paid. It is not inconsistent with the Fair Labor Standards Act, nor is it inconsistent with the determination of this Court in *Overnight Transportation Co., Inc. v. Missel*, supra. Respondents advocated the computation method adopted by the trial court, citing as authority *State v. Comfort Cab*, 286 A.(2d) 742, 748 (N.J. 1972).

Petitioner's original contracts with its employees were not in contemplation of the Fair Labor Standards Act, as it was not thought applicable to the oral wage agreements that it had with its personnel. Personnel were paid on a monthly basis and worked between 65 and 75 hours a week, which should be divided into the weekly wage to determine the "regular rate of pay." To do

so would be consistent with the rulings of this Court as it followed the reasoning of the federal court in *Missel v. Overnight Transportation*, 40 Fed. Supp. 174, wherein an employee's contract was not evidenced by any writing and no record was kept of the actual hours. The court then divided the assumed average hours into the actual salary to determine the regular rate of pay, and authorized the payment of overtime for the hours in excess of 44 hours.

The court there referred to the rulings of the Administrator of the Wage and Hour Division, Department of Labor, and interpreted Bulletin No. 4, 1940, Wage and Hour Manual, 95, 96. We refer the Court to 29 C.F.R. 778.114, a promulgation under the terms of the Fair Labor Standards Act, which states in part:

> "Since the salary of such situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of the hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours of one-half such rate in addition to the salary satisfied the overtime pay requirement because such hours have already been compensated at the straight time regular rate under the salary agreement."

The *Missel* case went through the Circuit Court of Appeals, wherein it was affirmed at 126 F.(2d) 98, where, at page 110 of its opinion, the court stated as follows:

> "The Wage and Hour Division has construed ' regular rate' of pay to mean the actual hourly rate of pay, computed by dividing the actual weekly wage by the number of hours actually worked. Regulations on records, Section

516.4, 1940 Wage & Hour Man. 282; Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 96. Where the employee works an irregular or fluctuating number of hours from week to week, his regular rate of pay is to be computed each week by dividing his weekly salary by the number of hours he worked that week. See Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 97. Similarly, a vast majority of the courts agree that the regular rate is to be computed on the basis of wages actually received each week divided by the actual number of hours worked each week."

The court went on to clarify, using an example. Finally, the case reached this Court, at 316 U.S. 572, which affirmed both of the lower courts and stated at page 580:

"No problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked,[16] to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense, inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours, the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act, if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each cir-

cuit court of appeals which has considered such problems. See *Warren-Bradshaw Drilling Co. v. Hall*, 124 F.2d 42, 44; *Bumpus v. Continental Baking Co.*, 124 F.2d 549, 552, cf. *Carleton Screw Products Co. v. Fleming*, 126 F.2d 537, 541. *It is this quotient which is the 'regular rate at which an employee is employed'* under contracts of the types described and applied in this paragraph *for fixed weekly compensation for hours, certain or variable.*[17]" (Emphasis supplied.)

It is again important to note the footnotes of the Supreme Court in this case. Footnotes 16 and 17, at pages 580-581, stated:

"[16]Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours."

"[17]This has been the Administrator's interpretation of the Act. Interpretative Bulletin No. 4 issued October 21, 1938, revised November, 1940. While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application. Cf. United States v. American Trucking Assns., 310 U.S. 534, 549; United States v. Darby, 312 U.S. 100, 118, n. 2; Graves v. Armstrong Creamery Co., 154 Kan. 365, 370, 118 P.2d 613, 616. Even negative construction may be significant. Trade Comm'n. v. Bunte Bros., 312 U.S. 349, 351, 352.

"Regulations on records issued pursuant to Sec. 11 (a) have since September 15, 1941, referred to Interpretative Bulletin 4 for the method of computation. 6 Fed. Reg. 4695, n. 9."

The decision of this Court in *Overnight Transportation Co., Inc. v. Missel* came down on June 8, 1942. It has been followed consistently by all federal courts and the various state courts since that date.

In *General Electric Company v. Porter*, 208 F.(2d) 805, 812, the Ninth Circuit Court followed the reasoning of this Court in *Overnight*. The employees in that particular case admitted that it was a proper method of computation, particularly on a fixed monthly wage, as is the case in the Glick proceeding. This Court, to some extent, reaffirmed its reasoning by denying certiorari in that matter, at 347 U.S. 975. The most recent case reported is *Petrlik v. Community Realty Company*, 347 Fed. Supp. 638, a Maryland case decided in 1972, which once again follows *Overnight v. Missel* and consistently applies the reasoning contained therein. For over thirty years the various courts in the United States have followed the reasoning of the Supreme Court of the United States in *Overnight Transportation Co., Inc. v. Missel*, supra, and the Montana Supreme Court should be so advised.

In short, the Supreme Court of the State of Montana has decided a federal question of substance, not in accord with the applicable decisions of this Court.

In light of the decision of the United States Supreme Court and numerous federal and circuit court decisions referred to, it is of paramount importance and imperative that the Supreme Court of the State of Montana be corrected in its interpretation of the Fair Labor Standards Act, to protect past, existing and future contracts of the State of Montana, governmental subdivisions and private employers therein.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Billings, Montana 59103

By: */s/ C. W. Leaphart, Jr.*

AFFIDAVIT OF SERVICE

tate of Montana)
ounty of Lewis & Clark) ss.

I, C. W. Leaphart, Jr. attorney for the Petitioner herein, epose and say that on the 3rd day of July, 1973, I served opies of the foregoing Writ of Certiorari to the Supreme Court f Montana by mailing three copies to:

Hon. Thomas E. Kearney
Clerk, Montana Supreme Court
Capitol Building
Helena, Montana 59601

nd by mailing 29 copies to:

Corette, Smith & Dean
Attorneys at Law
Professional Building
Butte, Montana 59701

y placing the same in envelopes addressed as above, with prop- r first class postage attached, and depositing them in the United States mails at Helena, Montana, on said date.

/s/ C. W. Leaphart, Jr.

Subscribed and Sworn to before me this 3rd day of July, 1973.

/s/ Gwen Blacker
Notary Public for the State of Montana. Residing at Helena, Montana. My commission expires October 29, 1974.

(Notarial Seal)

APPENDIX

APPENDIX A

No. 12326

IN THE SUPREME COURT OF THE STATE OF MONTANA

1973

ROBERT ELMER GLICK, et al.,

Plaintiffs and Respondents,

-vs-

THE STATE OF MONTANA, ACTING BY AND THROUGH THE MONTANA DEPARTMENT OF INSTITUTIONS,

Defendant and Appellant.

Appeal from: District Court of the Fifth Judicial District, Honorable John B. McClernan, Judge presiding.

Counsel of Record:

For Appellant:

Hon. Robert L. Woodahl, Attorney General, Helena, Montana.
Lawrence D. Huss and William N. Jensen, Assistant Attorney Generals argued, Helena, Montana.

For Respondents:

Corette, Smith and Dean, Butte, Montana.
Kendrick Smith argued, Butte, Montana.

Submitted: February 26, 1973
Decided: April 9, 1973

Filed: April 9, 1973
/s/ Thomas J. Kearney, Clerk

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

This is an appeal from a judgment entered for plaintiffs in the district court of the fifth judicial district, Madison County, and against defendant State of Montana. The judgment was in the amount of $489,289.36.

Plaintiffs are twenty-six employees of the Montana Children's Center. They filed a complaint on June 25, 1969, seeking to recover wages and overtime allegedly due to them under the Federal Fair Labor Standards Act for a time period between February 1, 1967 to January 31, 1969. The complaint consisted of twenty-six counts, one for each plaintiff. An amended complaint was filed stating causes of action under both state and federal law; later the first cause of action under state law was withdrawn.

The matter was argued before two district judges resulting in the granting of a limited summary judgment by Judge Frank Davis. Judge Davis found plaintiffs were entitled to the benefits and protection of the Fair Labor Standards Act. That decision was appealed to this Court which sustained the trial court's decision on liability and returned the cause to the district court for determination of the amount due each plaintiff. Glick v. State of Montana, 157 Mont. 204, 485 P.2d 42.

Thereafter, the district court, sitting without a jury on January 3 and 4, 1972, heard the testimony presented and took the matter under advisement. On February 7, 1972, the court issued its findings of fact and conclusions of law.

Thereupon, defendant State filed consolidated motions to amend the judgment and for a new trial. Upon denial of its motions, it now appeals.

Four issues are presented for review:

1. Did the court err in its findings as to the number of hours

worked by each plaintiff to include an average of eight hours overtime?

2. Did the court err in computing the "regular rate of pay" under the Fair Labor Standards Act?

3. Did the court err in finding liquidated damages which in effect doubled the award?

4. Did the court err in awarding attorney fees in the amount of $140,000?

To properly consider the first issue it is necessary to consider the original employment agreement. That agreement varies between male and females only insofar as some of the male plaintiffs did shifts as night watchmen as part of their duties, and those additional hours must be compensated for. Typical of those who worked at the Children's Center are plaintiffs Glick. Mr. Glick testified that he sought employment for himself and his wife in 1964. He was interviewed by Mr. Finch of the Children's Center. Glick testified as to the periods of employment on the basis of a twenty-four hour day, and that "we was allowed one part of one day, we'll say, from I think it run from 7 o'clock in the morning until 9 o'clock at night in one week we were allowed that off, and the next week we were allowed from 7 o'clock in the morning until all that day and all that night until 7 o:clock the next night off." Later during the period in question, from 1967 to 1969, as houseparents the Glicks got Monday and Sunday off.

Mr. Balkovatz, superintendent of the Children's Center, testified as to the work hours and conditions:

> "* * * I was not directly involved in the interviewing of each and every one of the individuals, but I instructed my staff upon interviewing these people that they were to instruct them specifically that they would have to live in, they would have two

> days off a week, that they would be required to live in for 24 hours, and also they would be instructed too that they would have a two-hour rest period during the school hours or during the 180 school days; and we also told them that in the summer in the event we were able to provide additional staffing to augment our program we would remove the children from their cottage and this would give them additional free time."

He also testified that in his opinion each employee averaged about two hours off a week over and above sleep time and the two normal hours off each day.

Some of the plaintiffs had been employed over twenty years, while others began their employment in the 1950's and 1960's. All had similar working conditions, as set forth above, and none of them had kept records. The State likewise had no provision prior to February 1, 1969, to record the actual hours worked, as the employment agreement was for a twenty-four hour day.

At the completion of the State's case, counsel for both plaintiffs and defendant entered into the following stipulation offered by plaintiffs' attorney as to those plaintiffs not testifying:

> "* * * we would now ask counsel for the State to stipulate that if the other Plaintiffs were called, they would testify in almost the same way as Mrs. Moore, that they had 8 hours of effective sleep and during the daytime hours had one hour of free time available only during school days, and that is the only effective time off that they would testify they had during these periods * * *."

The trial court found plaintiffs worked an average of sixteen hours per day, and night watchmen worked sixteen and two-tenths hours per day, on a five day week. The testimony given

by Stewart Moore, Margaret Moore, Harry Helton, and the Roslings, reveals the trial court erred in setting the total work week as eighty hours per week, plus one hour extra for those who performed night watchman duty. The sum total of the evidence shows work weeks running from sixty-five to seventy-five hours per week, which would average closer to seventy hours per week. Due to this obvious error in the record, the case must be returned to the district court for recomputation.

We note that on recomputation, the record indicates as to night watchman time the plaintiffs did not perform these duties for the last six months of the disputed period.

Defendant's second issue relates to the trial court's method of determining the regular rate of pay under the provision of the Federal Fair Labor Standards Act. The issue involves a novel question of the relationship between the Fair Labor Standards Act and Montana's constitutional provision for an eight hour day, and statutory provision for an eight hour per day work day.

The formula adopted by the trial court was:

Monthly wage x 12 month year ÷ 52 weeks = Weekly wage.

Weekly wage ÷ 40 hrs/wk = Regular rate of pay.

Defendant State argues the court erred in using an artificial base of forty hours as a divisor in determining the regular rate of pay. Further, that Fair Labor Standards Act cases must be computed in accord with the decisions of the various federal district courts, circuit courts of appeal, and the United States Supreme Court, and these court decisions have adopted, in an unbroken series of cases, the following formula to establish the regular rate of pay:

Monthly wage x 12 mo/yr ÷ 52 weeks/yr = Weekly wage.

Weekly wage ÷ Actual no hrs worked/wk = Regular rate of pay.

We note both formulas are the same in determining the weekly wage, but that in determining the regular hourly rate, by using the actual number of hours worked, the regular rate of pay decreases as the number of hours worked increases.

Defendant cites and relies upon leading United States Supreme Court cases for setting forth the criteria for the above formula. Overnight Motor Transport Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L ed 1682; Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 65 S.Ct. 11, 89 L ed 29; Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 68 S.Ct. 1186, 92 L ed 1502.

However, as noted by plaintiffs, the above citations do not consider the question considered here by the district court -- a state with an eight hour constitutional provision plus a statutory provision so providing. Plaintiffs argue the Federal Fair Labor Standards Act provides a minimum base and that states can give greater benefits to the workers of their state.

In support of their position plaintiffs argue that the court's finding No. 4, relying on Montana's Constitution and statute is controlling. The district court's finding No. 4 reads:

> "4. On the issue of the hourly wage rate, the Court finds and determines that by reason of the provisions of the Constitution of Montana (Mont. Const. ART. XVIII, Sec. 4) and by reason of the Montana Statute, R.C.M. 1947, Sec. 41-1121, a period of eight hours a day constitutes a day's work in all employments and particularly in all employments by any state government * * *"

Article XVIII, Sec. 4, of the Montana Constitution, reads:

> "A period of eight hours shall constitute a day's work in all * * * employments, except farming and stock raising."

Section 41-1121, R.C.M. 1947, provides:

> "A period of eight hours shall constitute a day's work in all works or undertakings carried on or aided by any * * * state government."

Plaintiffs cite and rely on a recent case from New Jersey, State v. Comfort Cab, Inc., 118 N.J.Super. 162, 286 A.2d 742, 748. The facts there concern the Fair Labor Standards Act as applied to cab drivers, but much of what was considered there is applicable here in our interpretation of what is "maximum work week" and "overtime rates" where there is a state law controlling. There the court held:

> "The federal act, 29 U.S.C.A. Sec. 218(a), mandates compliance with a state maximum workweek requirement lower than that set by the federal act. Though 'workweek is not defined in the federal act, it is clearly the intent of the Congress that a lower state maximum hour regulation, creating an overtime arrangement more favorable to the employee than that contained in Sec. 207 of the federal act, should prevail. Such an interpretation is dictated by the plain meaning of the statutory language. 'Maximum workweek' does not in fact limit the number of hours an employee may work. Missel v. Overnight Motor Transp. Co., 126 F.2d 98, 104 (4 Cir. 1942), aff'd 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682, reh.den. 317 U.S. 706, 63 S.Ct. 76, 87 L.Ed. 563. It must refer to that number of excess hours worked for which an overtime rate must be paid. This conclusion is further evidenced by the utilization of the term 'workweek' in 29 U.S.C.A., Sec. 207, where it is used in reference to the number of hours worked in excess of which the overtime rate must be paid. See, e.g., 29 U.S.C.A., Sec. 207(a)(2)(A). The term 'maxi-

mum workweek' in 29 U.S.C.A., Sec. 218(a) is thus synonymous with maximum hour/overtime. Accordingly, the requirement of 29 U.S.C.A., Sec. 218(a) that a lower state maximum workweek be enforced mandates the enforcement of a state maximum hours/overtime provision more favorable to the employee than that set by the federal act. Since, as indicated, this State's maximum hour/overtime provision (N.J.S.A. 34:11-56a4) does so favor employees, that statute is applicable to defendant's non-driver employees for the period February 1, 1967 to December 25, 1968, and the court has jurisdiction over violations thereof."

Here, as in New Jersey, we have constitutional and statutory authority on the eight hour day that cannot be disregarded. While we give no credence to plaintiffs' argument that as a result of the bringing of this action the State began to computerize its payroll and the Children's Center became the first institution to be so handled. However, commencing February 1, 1969, when the computer payroll went into effect, is is not denied that each employee was paid on a basis of a forty hour workweek and for time and a half on hours worked in excess of forty. We find this formula is proper in computing the overtime compiled during the two year period from February 1, 1967 to January 31, 1969.

Defendant's third issue is directed to the trial court's granting liquidated damages against defendant. The trial court's finding of fact No. 6 reads:

"6. On the issue of liquidated damages, the Court finds and also concludes that under the Fair Labor Standards Act, when there has been a determination of the amount of total wages due, less wages received, then the amount of net wages due should be inserted in the form of the Exhibit attached hereto and marked Exhibit 'B' and then

and when that has been done, a like and equal amount must be inserted in said form as liquidated damage in line 2 near the bottom of said Exhibit 'B'. The Court finds and determines that liquidated damages are required and are not a matter of discretion because the State of Montana has not shown any good faith in failing to pay these Plaintiffs for their overtime work. On the contrary, the Court finds that the State of Montana chose to ignore and did ignore the statement or advice given by Mr. Donald Drew, Field Office Supervisor, United States Department of Labor, Wage and Hour and Public Contracts Division of Salt Lake City, Utah, dated March 7, 1967, which specifically advised that the 'Act would apply to all employees' of Montana Children's Center. The ignoring and disregarding of this advice and the failure by the State and the Department of Institutions to do anything further until February 1, 1969, is an indication of positive lack of good faith and shows an evasiveness which in its effect, constitutes bad faith in not paying these Plaintiffs at the Childrens' Center for their overtime work. Additionally, the Court finds that payments made by the Defendant on an eight-hour day and 40-hour week to employees at Pine Hills School and Mountain View School, would also indicate a positive lack of good faith and evasiveness and indeed bad faith in not paying these Plaintiffs at the Childrens' Center for their overtime work."

Historically the Fair Labor Standards Act had no application to a state children's home. In 1966 Congress amended the Fair Labor Standards Act (29 U.S.C., Sec. 203(s)(4) to include the operation of an elementary or secondary school whether or not operated for profit. The amendment became effective February 1, 1967. The record here indicates that at about that time Mr. Gooch, Personnel Director of the Department of Institutions,

began making inquiries of the federal wage and hour office, located in Salt Lake City, Utah, to ascertain whether the personnel at the Montana Children's Center came under the Fair Labor Standards Act. Several telephone calls were made to the federal office but the question raised was not resolved nor did Mr. Gooch get a definite answer. He testified:

"Q. As a result of your contact with the Federal Wage and Hour officials, did you receive a definite answer as to whether or not the Montana Children's Center was covered by the Fair Labor Standards Act? A. No, I did not.

"Q. Did a question arise subsequent to this conversation concerning the application of the Fair Labor Standards Act to the Montana Children's Center? A. Yes.

"Q. Approximately when did the question arise to the best of your recollection and memory? A. It was a continual question from the time that the Fair Labor Standards Act first came to our attention.

"Q. All right, what action subsequent to your initial contact with the federal officials was taken to resolve the question one way or another? A. Several telephone conversations to Salt Lake City, where the Fair Labor Standards people are based.

"Q. And was the matter ever finally resolved? A. It never was resolved. They could not give me definite information.

"Q. Were any meetings held, excuse me, did you ever meet with representatives of the Wage and Hour Division? A. We had requested meetings but none were held until December of '68.

"Q. And who attended that meeting? A. We invited superintendents as a department to attend the meeting, the Labor Commissioner's office was in attendance, the University System was invited, the Budget Office, other State people who would be concerned with implementation of the Wage and Hour provision.

"Q. And when was this meeting held again, the date, the approximate date, at least by month? A. To the best of my recollection, it was in the latter half of December of 1968.

"Q. Now at this meeting in late December, were representatives from the Wage and Hour Division of the Department of Labor in attendance? A. Yes, Mr. Donald Drew was in attendance.

"Q. Were any representatives of the Governor's office in attendance? A. I don't recall.

"Q. What was the result of this meeting? A. I don't know if I could comment on the result. Well, I guess I could. The result of the meeting was to advise us, let me say the meeting was held to advise us of wage and hour provisions and their application, and the result of the advisement was that they were instructed at that time that definitely the Children's Center would be a covered agency.

"Q. This was in late December, 1968? A. Yes, sir.

"Q. Was this the first knowledge that you yourself, and to the best of your recollection the Department of Institutions had that the Montana Children's Center was covered by the Fair Labor Standards Act?"

At this point there was considerable discussion as to whether or not this was the first knowledge, timewise, of this coverage, but the following testimony was later brought out in direct examination:

"Q. Generally does the Board of Institutions, through the Director, require you to handle personnel matters relating to State institutions as part of your job as Personnel Director? A. Yes, they do.

"Q. During the period in question, February 1, '67, through January 31, '69, were you the representative of the Board at all proceedings concerning the wage and hour applications of the Fair Labor Standards Act to the various State institutions? A. Yes, I was.

"Q. And during any of these meetings when you acted as a representative of the Board of Institutions prior to the meeting of December, '68, were you ever advised as Personnel Director that the Montana Children's Center was covered by the provisions of the Fair Labor Standards Act? A. No, I was never so advised.

"Q. Did you communicate with the Governor's office subsequent to the meeting held in December, '68, concerning application of the Fair Labor Standards Act? A. Yes, we did.

"Q. You heard the testimony of Mr. Balkovatz in the introduction into evidence of Executive Order 1-69 stating that it has been called to the attention of the Governor that the employees of the Montana Children's Center at Twin Bridges were not in compliance with federal wage hour legislation and federal law requires the institution

to be in compliance no later than February 1st, 1969, are you familiar with that Executive Order? A. Yes, I am.

"Q. As a result of that Executive Order, to the best of your knowledge did the Montana Children's Center come into compliance with the provisions of the Fair Labor Standards Act? A. Yes, they did."

Some emphasis is made by plaintiffs directed to the letter of Mr. Gooch, dated March 3, 1967, several months after the act became effective, to a Mr. Donald Drew, the administrator of the act in this area, wherein he asked:

"SITUATION The law specifies 'Educational Institutions' are included as covered agencies. We have an institution that has the primary objective of caring for dependent and neglected children, however, encompassed within this institution's program is education on the elementary and secondary level.

"QUESTION: Would that portion of the institution that is involved in the education process be considered as being subject to the act? If so, would it include such positions that are not directly involved in the teaching process, but supportive thereof, such as clerks, janitors, etc.

"We will appreciate your consideration of this request."

Plaintiffs' Exhibit "7" shows that on March 7, 1967, an answer was received from Mr. Drew, which said:

"If the educational program does constitute an elementary and secondary school as determined

under State law, that Act would apply to all employees of the units. Lacking full details on the program in question, I cannot render an opinion. If you wish to submit further information, I will give the matter additional consideration."

The record indicates, and Mr. Gooch testified, that he understood the word "units" to mean educational units located at the Center and that until Executive Order 1-69, the act did not apply to the entire personnel of the institution. Personnel within the educational program were put under the act.

These are not facts indicating a lack of good faith, much less do they indicate as the trial court found, a "positive lack of good faith and shows an evasiveness which in its effect, constitutes bad faith."

In our opinion, the test for a determination of what constitutes good faith is found in *Snelling v. O.K. Service Garage, Inc.* (E.D.Ky. 1970), 311 Fed Supp. 842, 846, where the court stated:

> "Left for determination is whether the plaintiffs are entitled to liquidated damages as provided for in section 16 of the Act. This is a fact question and must be decided according to the reasonableness of the defendant's decision not to pay minimum and overtime compensation. If the defendant in good faith reasonably believed the Act did not apply to his employees then liquidated damages should be refused. The liquidated damage provision of the Act provides a mechanism whereby plaintiffs can be compensated for the withholding of a minimum wage which may have resulted in intangible damages concomitant with substandard living situations. Theoretically liquidated damages are compensatory, but whatever label is attached to such an award it cannot be

> gainsaid that it is a severe sanction. Prior to the Portal-to-Portal Act of 1947, 29 U.S.C. section 260, liquidated damages were deemed to be mandatory in all minimum and overtime compensation cases. [Cases cited] It became apparent, however, that such an onerous rule created wholly unexpected liabilities which threatened employers with financial ruin and encouraged champertous suits involving employees who hoped to acquire a windfall. Accordingly Congress enacted the Portal-to-Portal Act of 1947 which authorized courts not to award liquidated damages where it appeared the employer had acted in good faith. Liquidated damages should only be granted where an oppressive employer, well knowing it has no defense to the application of the Fair Labor Standards Act, stubbornly refuses to comply with it. The facts of this case are not so clear cut that the defendant could not sincerely believe he was exempt."

For cases citing examples of good faith see: Retail Store Emp. Loc. 400 v. Drug Fair-Community Drug Co., 307 Fed.Supp. 473 (D.C. 1969); Martinez v. Phillips Petroleum Co., 283 Fed. Supp. 514 (Idaho 1968); Crago v. Rockwell Mfg. Co., 301 Fed. Supp. 743 (Penn. 1969); Hodgson v. Daisy Mfg. Co., 317 Fed. Supp. 538, 554, (Ark. 1970).

In Hodgson, the court speaking on the issue of good faith said:

> "This action primarily involved an issue of law which was novel at the time the suit was commenced, in 1965, and concerning which this court has only recently been provided with binding precedent. The Third Circuit Court of Appeals * * * and more recently the Eighth Circuit Court of Appeals * * * have construed the word

'equal' as used in the Act, to mean 'substantially equal' as opposed to 'substantially identical.' This construction of one of the essential elements of the Act is contrary to the meaning which might in good faith be inferred by an employer from a fair reading of the legislative history of the statute * * *. The fact that the law as it applied to the defendant was unsettled for almost all of the five years this suit has been pending is clearly a factor bearing on the question of good faith. [Citing case] Few employers could satisfy a test of good faith if required to correctly anticipate judicial precedent."

Plaintiffs' counsel admits this is a novel issue of law, one of first impression, and to hold defendant guilty of bad faith is a manifest abuse of the trial court's discretion.

Defendant's final issue on appeal directs itself to the award of attorney fees.

Congress in 29 U.S.C. Sec. 216(b), provided:

"The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Here, counsel had a contingent fee contract arrangement with all plaintiffs that provided, according to counsel's testimony:

"The Montana schedule adopted by the Bar Association for contingent fee arrangements is 25% of a contingent fee on the settlement; 33 1/3 after suit is brought if settled; 40% if tried; and 50% if the matter goes to the Supreme Court. Now this has already been to the Supreme Court, and for all I know it will go again. We do not ask for

> more than 40%, but we do ask for that 40%. We ask for it under the Fair Labor Standards Act, which specifically provides for the allowance of attorney fees to be paid by the State. As I said in my opening statement to the Court I am not seeking and do not seek a duplication in fees; but to the extent that the Court will impose upon the State of Montana the obligation to pay attorneys fees, to that extent the fees we will charge directly to each Plaintiff will be correspondingly reduced."

The trial court went the entire distance with counsel's request; it awarded 40% for attorney fees, amounting to approximately $140,000.

In view of our remand for modification of the amount of the award to plaintiffs herein, the award of attorney fees must likewise be set aside and remanded for modification. In this connection, we note the Fair Labor Standards Act provides for an award of "a reasonable attorney's fee to be paid by defendant". In awarding attorney fees the district court is not bound to award attorney fees on the basis of the provisions of the contingent fee agreement between plaintiffs and their attorneys, but is entitled to consider this as one of the factors to be considered in determining "a reasonable attorney's fee" under the Fair Labor Standards Act. We remand to the district court for that determination accordingly.

The cause is remanded to the trial court for action not inconsistent with this opinion.

/s/ John Conway Harrison
Associate Justice

We Concur:
/s/ James T. Harrison
Chief Justice

/s/ Frank I. Haswell

/s/ Gene B. Daly
Associate Justices

Mr. Justice Wesley Castles concurring in part and dissenting in part:

I concur in part of the majority opinion but dissent to the Court's determination of Issue No. 2, that is as to the rate of pay. There is nothing "novel" about the question. The plaintiffs' rate of pay was the weekly wage divided by the hours worked. That was the agreement; the only change came about by operation of law. I would reverse the district court on that item too.

/s/ Wesley Castles
Associate Justice

APPENDIX B

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MADISON

ROBERT ELMER GLICK, CLARA KATHERINE GLICK, IRENE BURRIS, LORRAINE GOOSELAW, NETTIE ROSLING, EVERT B. ROSLING, STEWART A. MOORE, MARGARET E. MOORE, DONALD LEROY MANTHA, JANE F. MANTHA, AHTI HANNI, MINNIE HANNI, CANDACE L. BRADLEY, KENNETH L. BRADLEY, LAWRENCE C. OLSON, MARGARET H. OLSON, DORIS T. BRAY, WILLIAM K. BRAY, BETTY BARKELL, HAZEL V. VOSS, IONA PARKER, HELEN V. STOKINA, GEORGIA LASLOVICH, HARRY L. HELTON, JR., ROBERT PRIVRATSKY and JESSIE T. CARNEY,

Plaintiffs,

-vs-

THE STATE OF MONTANA, ACTING BY AND THROUGH THE MONTANA DEPARTMENT OF INSTITUTIONS,

Defendant.

No. 5946

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. That plaintiffs, and each of them, were employed on the basis of five days per work week and 24 hours per day less time off for sleeping, resting, and other free time.

2. That plaintiffs, and each of them, were allowed eight (8) hours free, uninterrupted sleep time each weekday.

3. That plaintiffs, and each of them, except for Harry Helton, Jr., were allowed two (2) hours of free, uninterrupted time for a rest period each workday.

4. That plaintiffs, and each of them, except for Harry Helton, Jr., were allowed two (2) hours of free, uninterrupted time each workweek to carry out personal tasks and entertainment.

5. That individual plaintiffs, Evert Rosling, Stewart Moore, Donald Mantha and Lawrence Olson, worked as relief night watchmen for one night every other week from February 1, 1967, through July 1, 1968, or their individual dates of termination, whichever came first.

6. That aforesaid individual relief night watchmen worked from 10:00 p.m. until 5:30 a.m. each night they worked as individual night watchmen and, further, that said individual relief night watchmen were allowed full compensatory sleep time for each shift, both before and after each shift.

7. That aforesaid individual relief night watchmen are entitled to additional hours of overtime for said shifts.

8. That plaintiff, Harry Helton, Jr., worked a sixty-five (65) hour workweek, or thirteen (13) hours each workday.

9. That plaintiffs, and each of them, were paid straight time for each and every hour worked.

10. That Plaintiffs' Exhibit No. 1 is a true and correct statement of the days worked and monthly rate of pay for the plaintiffs and each of them, except that the value of room and board must be added to monthly rate in Period No. 1, for plaintiffs working therein, as follows:

Employee	Monthly Rate	Room & Board	Total Mo. Wage
Robert E. Glick	$265.00	$15.00	$280.00
Katherine C. Glick	265.00	36.75	301.75
Lorraine Gooselaw	301.00	31.75	332.75
Nettie Rosling	301.00	31.75	332.75
Evert Rosling	315.00	31.75	346.75
Stewart A. Moore	265.00	31.75	296.75
Margaret Moore	265.00	31.75	296.75
Donald Mantha	265.00	53.50	318.50
June Mantha	265.00	31.75	296.75
Ahti Hanni	265.00	31.75	296.75
Minnie Hanni	265.00	31.75	296.75
Candace L. Bradley	265.00	31.75	296.75
Kenneth Bradley	265.00	31.75	296.75
Lawrence Olson	265.00	31.75	296.75
Margaret Olson	265.00	31.75	296.75
Hazel Voss	301.00	31.75	332.75
Iona Parker	301.00	36.75	337.75
Helen Stokina	301.00	31.75	332.75
Harry Helton, Jr.	407.00	50.00	457.00
Jessie Carney	301.00	31.75	332.75

11. That the plaintiffs, and each of them, were compensated on a monthly basis from February 1, 1967 to January 31, 1969.

12. That, commencing August 1, 1968, the Montana Children Center joined the central payroll system for the state of Montana.

13. That the change by Montana Children's Center to the central payroll system involved a change only in the accounting system and that neither plaintiffs' wages nor hours of work change

14. That plaintiffs, and each of them, base their claim of action solely on 29 U.S.C., Sec. 201, et seq., the Fair Labor Standards Act.

15. That defendant sought a determination from federal authorities charged with the administration of the Fair Labor Standards Act as to whether the plaintiffs' employment positions were included within the provisions of the Fair Labor Standards Act and that said determination by said federal authorities was not made until December, 1968.

16. That defendant reasonably believed that the custodial functions of the Montana Children's Center were not covered by the provisions of the Fair Labor Standards Act.

17. That defendant acted in good faith in failing to conform to the provisions of the Fair Labor Standards Act.

18. That defendant conformed to the provisions of the Fair Labor Standards Act subsequent to a determination by the proper federal authorities that said act covered the custodial functions of Montana Children's Center.

19. That the weekly rate of pay for plaintiffs, and each of them, is determined by multiplying the individual plaintiff's monthly wage by twelve (12) months per year and dividing that total by fifty-two (52) weeks per year.

20. That the regular hourly rate of pay for plaintiffs, and each of them, is determined by dividing the individual plaintiff's weekly wage by the total number of hours worked during the week.

21. That the plaintiffs, and each of them, have been compensated at straight time for all hours worked between February 1, 1967 and January 31, 1969 and are, therefore, entitled to one-half (1/2) times the regular hourly rate for all hours worked in excess of forty-four (44) hours during the workweek for the period from February 1, 1967 through January 31, 1968, and for all hours worked in excess of forty-two (42) hours during the workweek for the period from February 1, 1968 through January 31, 1969.

22. That plaintiffs, and each of them, are not entitled to attorneys' fees.

23. That plaintiffs, and each of them, are not entitled to costs.

CONCLUSIONS OF LAW

1. That monthly wages shall consist of the monthly salary plus the reasonable value of room and board provided without charge to plaintiffs, and each of them, by defendant.

2. That the weekly rate of pay for the plaintiffs, and each of them, is determined by multiplying the individual plaintiff's monthly wage by twelve (12) months per year and dividing that total by fifty-two (52) weeks per year.

3. That the hours worked per day do not include time spent in free, uninterrupted sleep.

4. That the hours worked per day do not include free, uninterrupted time for rest, relaxation, and private pursuits.

5. That the regular hourly rate of pay for plaintiffs, and each of them, is determined by dividing the individual plaintiff's weekly wage by the total number of hours worked during the week.

6. That, as a matter of law, the plaintiffs, and each of them, are entitled to one-half (1/2) the regular hourly rate of pay for any hours worked in excess of forty-four (44) hours during the workweek for the period from February 1, 1967 through January 31, 1968, and hours worked in excess of forty-two (42) hours during the workweek for the period from February 1, 1968 through January 31, 1969.

7. That defendant acted in good faith in failing to conform to the provisions of the Fair Labor Standards Act and, therefore,

plaintiffs, and each of them, are not entitled to liquidated damages.

8. That defendant acted in good faith in failing to conform to the provisions of the Fair Labor Standards Act and, therefore, plaintiffs, and each of them, are not entitled to interest on any award of this court.

IT IS HEREBY ORDERED AS FOLLOWS:

That judgment be entered for the defendant according to the proposed findings of fact and conclusions of law and against the plaintiffs, and costs be awarded to the defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Done in chambers at Virginia City, Montana, this 21st day of January, 1972.

/s/ Frank E. Blair
District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MADISON

(Title omitted in printing)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing before the Court, sitting without a jury, the Honorable Frank E. Blair presiding, pursuant to Stipulation. Plaintiffs were represented by Kendrick Smith and Sam B. Chase, and the Defendant was represented by Lawrence D. Huss and John W. Northey.

Evidence, both oral and documentary, was presented to the Court, Briefs were filed and the matter taken under advisement an now the Court being fully advised does hereby make and enter its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The Court finds and concludes that the State of Montana, acting by and through the Montana Department of Institutions, is liable for all overtime work performed by each of the Plaintiffs during the period February 1, 1967 to January 31, 1969; and that said liability has been fully fixed, set and established and determin by a prior appeal in this case now reported in Glick v. State of Mo tana, 485 P.2d 42 (Mont. 1971). This Court is bound by the decision of the Supreme Court of Montana and liability on the part of the State has been established under the Federal Act known as the Fair Labor Standards Act.

2. The Court finds that there are six areas involving issues an proof and they will be dealt with separately in the Findings hereafter made and for convenience, they are now referred to as follow

(a) The issues of periods of employment, days worked, mo ly rate of pay and all wages actually paid.
(b) The issue of hourly wage rate.
(c) The issue of hours worked in excess of eight hours per day.

(d) The issue of liquidated damages.
(e) The issue of attorneys' fees.
(f) The issue of interest.

The following Findings on these stated issues are made in a general way and the final determination of the money amount of each judgment for each Plaintiff will be hereafter made by the parties and if they are unable to agree on the same, jurisdiction will be and is hereby retained by the Court for the purpose of entering final judgment in each of the cases involving each of the Plaintiffs.

3. On the issues of periods of employment, days worked, monthly rate of pay and all wages actually paid, the Court hereby adopts and attaches hereto as Exhibit 'A' the Exhibit produced and introduced at the trial as Exhibit "1", as modified on the first period of employment for each employee as shown by Defendant's Exhibit 'C'. The Court finds that said Exhibit '1' of Plaintiffs as modified by Defendant's Exhibit 'C' is correct and accurate as to each of the Plaintiffs.

4. On the issue of hourly wage rate, the Court finds and determines that by reason of the provisions of the Constitution of Montana (Mont. Const., ART. XVIII, Sec. 4) and by reason of the Montana Statute, R.C.M. 1947, Sec. 41-1121, a period of eight hours a day constitutes a day's work in all employments and particularly in all employments by any state government; and further finds that a partial or complete recognition of this fact was made in August, 1968 by a computer determination of the hourly rate of pay at Montana Childrens' Center. Consequently, the Court finds and determines that eight hours per day is a day's work and forty hours is a work week for each of these Plaintiffs and that the hourly rate of pay or hourly wage rate for each Plaintiff must be determined by multiplying the monthly wage by twelve (for months), dividing by fifty-two (for weeks per year) and finally dividing by forty (hours for a work week).

The Court specifically rejects the suggestion and contention of the State that there is any other proper or permissible way to determine hourly wage rate and finds that it would be obviously unfair and improper to adopt any other hourly wage rate other than previously stated. In this connection, the Court finds also that there never was any specific contract for wages, other than a stated monthly wage with a later recognition of hourly wage rate based upon the formula and finding, now adopted by this Court.

* * *

CONCLUSIONS OF LAW

1. The Court adopts by reference and includes by reference

all of the Court's Findings of Fact, as the Court's Conclusions of Law.

2. The Court further concludes that the computations of (1) net wages due, (2) liquidated damages, (3) attorneys' fees, (4) tot award or judgment, can be hereafter made as to each Plaintiff by the attorneys for the parties hereto on the form as set forth on Exhibit "B" including all of the prerequisite determinations of hourly rate and overtime hours as set forth in these Findings and Conclusions; and in the event that the attorneys for the parties are not able to agree upon such computations for the purpose of completing Exhibit "B" as to each Plaintiff and preparing a form of judgment, then the Court hereby retains jurisdiction to order, and the Court will order, a further hearing to make the computations and to provide for the entry of a judgment for each Plaintif

3. The Court desires to request the attorneys for the parties to assist the Court as indicated in Paragraph 2 of these conclusion

DATED this seventh day of February, 1972.

/s/ Frank E. Blair, Judge

Filed February 7, 1972
Clerk of the District Court

APPENDIX D

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MADISON

(Title omitted in printing)

JUDGMENT

The above-entitled cause came on regularly for hearing before the Court, sitting without a jury, the Honorable Frank E. Blair presiding, pursuant to Stipulation. Plaintiffs were repre-

sented by Kendrick Smith and Sam B. Chase, and the Defendant was represented by Lawrence D. Huss and John W. Northey.

Evidence, both oral and documentary, was presented to the Court, Briefs were filed and the matter taken under advisement and the Court made findings of fact and Conclusions of Law dated February 7, 1972, and filed on the same day; and said Findings of Fact and Conclusions of Law as so made and filed are incorporated herein by reference, and are considered herein as if set forth in detail in this Judgment.

The attorneys for the parties, without waiver of any of their rights in regard to the Findings of Fact and Conclusions of Law and without waiver of any of their rights as to the form and substance of this Judgment, have complied with the provisions of Paragraphs numbered 2 and 3 of the Court's Conclusions of Law and have prepared the form of this Judgment.

No further hearing is necessary to make the computations required by the Findings of Fact and Conclusions of Law of February 7, 1972; and a Judgment as to each Plaintiff on each cause of action is incorporated herein with a separate numbered sheet and Judgment as to each Plaintiff, the same being numbered, deemed and considered as Judgments 1 to 26 inclusive for a like number of Plaintiffs; and each of said Judgments is as follows:

(mathematical computations omitted)

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that each of the Plaintiffs numbered 1 to 26 inclusive, shall have and recover judgment against the Defendant in accordance with Item No. 5 entitled "Total Judgment" as set forth on the final line and in the final amount on each of the included claims or causes of action numbered 1 to 26 included herein; and, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that interest on the final amount of the "Total Judgment" in each claim or cause of action shall run in favor of each Plaintiff and against the Defendant from the date of the entry of this Judgment.

AND, IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the State of Montana shall deduct for each Plaintiff from his or her respective "Net Wages Due" as shown in Item "1. Net Wages Due" in each claim or cause of action, the usual, normal and ordinary deductions which are required and necessary.

The Plaintiffs having waived costs, it is ordered that no costs be allowed to Plaintiffs.

DATED this sixth day of March, 1972.

/s/ Frank E. Blair, Judge

Filed March 6, 1972
Clerk of the District Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-70

THE STATE OF MONTANA, Acting by and through the MONTANA DEPARTMENT OF INSTITUTIONS, *Petitioner*,

v.

ROBERT ELMER GLICK, et al., *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of Montana

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully oppose the petition for writ certiorari as follows:

STATUTES INVOLVED

In addition to the constitutional and statutory provisions of the State of Montana and the provisions of the Fair Labor Standards Act of 1938, as amended, set

forth in the petition (pp. 2-5), the following provision of the Fair Labor Standards Act of 1938, as amended, is involved:

Section 18, 52 Stat. 1069, as amended, 29 U.S.C. § 218:

> "(a) No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act."

STATEMENT OF THE CASE

Section 3(d) of the Fair Labor Standards Act of 1938 (hereinafter referred to as the "FLSA") was amended (80 Stat. 831, 29 U.S.C. § 203(d)), effective February 1, 1967 (80 Stat. 844), to modify "the definition of 'employer' so as to remove the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions and schools." *Maryland* v. *Wirtz*, 392 U.S. 183, 187 (1968), which upheld the constitutionality of that amendment. Respondents (26 in all), who were employed by the Montana Children's Center, an institution of the State

of Montana administered by its Department of Institutions, thus were brought under the protection of the FLSA effective February 1, 1967.[1]

Although other State institutions under the Department of Institutions were on an 8-hour day and a 40-hour week throughout the period covered by this lawsuit (Tr. 183), and the employees were paid in compliance with the FLSA, this was not true of the Montana Children's Center and its employees (respondents). They worked substantially more than 40-hours per week and were paid a monthly salary that did not include any compensation for working overtime until February 1, 1969. On that date, as the trial court found (Pet. App. C, at 39), petitioner adopted an "hourly wage rate based upon the formula and finding, now adopted by this Court" and affirmed by the Montana Supreme Court.[2] Consequently, during the two-year period between February 1, 1967 and January 31, 1969, petitioner did not comply with the requirement of Section 7(a)(1) of the FLSA (29 U.S.C. § 207(a)(1))

[1] The applicability of the amended FLSA to respondents was upheld by the Montana Supreme Court in an earlier decision in this case reported as *Glick* v. *State, Montana Department of Institutions*, 157 Mont. 204, 485 P.2d 42 (1971). That decision is not questioned by petitioner in this Court. Some of the respondents were first employed by the Children's Center after February 1, 1967, but all were employed by the Center for at least part of the period, between that date and February 1, 1969, to which the litigation relates.

[2] The Montana Supreme Court reversed the trial court's finding that respondents worked 80 or 81 hours per week, concluding that the "sum total of the evidence shows work weeks running from sixty-five to seventy-five hours per week" (Pet. App. A, at 18), and remanded the case for recomputation of the precise totals (Pet. App. A, at 16-18). Although that ruling was made in the decision sought to be reviewed, it is not questioned here by petitioner or by respondents.

that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. . . ." [3] Respondents thus are entitled to recover the overtime compensation improperly withheld (50% of "the regular rate" on an hourly basis) during that period. This is not questioned here by petitioner.

The issues raised in the petition relate only to the ruling by the courts below as to respondents' "regular rate" of compensation upon which the improperly withheld overtime compensation is to be computed. Petitioner contends that that "regular rate" must be determined (after converting respondents' monthly compensation into weekly compensation) by dividing respondents' weekly compensation by the number of hours actually worked during the particular week. Both the trial court (Pet. App. C, at 39) and the Montana Supreme Court (Pet. App. A, at 18-21), however, construed provisions in the Montana Constitution (Art. XVIII, Sec. 4) and a Montana statute (Section 41-1121, R.C.M. 1947), establishing an 8-hour day and 40-hour workweek for State employees such as respondents, to afford respondents under the circumstances of this case a "regular rate" of pay computed on an hourly basis by dividing their weekly compensation by 40 hours. As a result, respondents were entitled

[3] With respect to employees, such as respondents, brought within the coverage of the FLSA by the amendments effective February 1, 1967, the maximum workweek was fixed at 44 hours during the first year and at 42 hours during the second year, and did not become 40 hours until the expiration of the second year after that effective date. 80 Stat. 842, 29 U.S.C. § 207(a)(2).

to more overtime compensation than they would have been entitled to under petitioner's contention as to the manner in which the "regular rate" should be determined.

The Montana Supreme Court noted (Pet. App. A, at 21), as the trial court had found (see p. 3, *supra*), that "this formula" had been adopted by petitioner itself "commencing February 1, 1969, when the computer payroll went into effect" after which the employees of the Montana Children's Center were "paid on a basis of a forty hour workweek and for time and a half on hours worked in excess of forty." Thus, respondents' complaint (filed on June 25, 1969) was limited to the two-year period between February 1, 1967 and January 31, 1969, the judgment below is limited to that period, and this litigation does not concern anything either before or after that period.

The Montana Supreme Court also set aside the trial court's award of liquidated damages to respondents (Pet. App. A, at 21-29) and remanded an award of attorney's fees to the trial court for modification (Pet. App. A, at 29-30), as well as remanding the issue of hours worked for recomputation (see fn. 2, p. 3, *supra*). Respondents have not and do not request this Court to review those rulings and, of course, petitioner does not seek to have them reviewed by this Court.

ARGUMENT

The people of the State of Montana, in adopting Art. XVIII, Sec. 4 of its Constitution, the legislature of the State of Montana, in adopting Section 41-1121 of its statutes, and the judiciary of the State of Montana, in construing and applying those State constitutional and statutory provisions, all have determined

that the "regular rate" of pay of employees of the State of Montana shall be computed, in the circumstances of this case, in a manner more favorable to the employees than otherwise would be required for purposes of calculating overtime compensation under Section 7(a) of the FLSA.[4] The Montana Department of Institutions, an agency of the State of Montana obviously cannot attack directly the policy thus adopted by the people and the legislature of the State and this Court does not have jurisdiction to review a State court's interpretation of the constitution or laws of the State even at the behest of a private party.

Petitioner has sought to cast this case, therefore, into the mold of a conflict between the State laws as thus construed and the FLSA as construed by this Court in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572 (1942). In essence, petitioner contends that the FLSA prohibits the State of Montana from providing by law for a method of computing the "regular rate" of pay of employees of the State that results in their being entitled to more overtime compensation than if that "regular rate" were computed by the method approved in *Missel*.

It is true that this Court in *Missel* approved the computation of the "regular rate" of pay of employees

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[4] Dividing respondents' average weekly compensation by the 40 hour workweek fixed by the State constitutional and statutory provisions for State employees obviously results in a higher "regular rate" of pay than would dividing their average weekly compensation by the 65 to 75 hours actually worked. This in turn results in higher overtime compensation, as that is based on the "regular rate" of pay.

[5] See, *e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

paid a weekly salary by dividing the actual hours worked during the week into that salary, where the employment contract did not otherwise specify the "regular rate." See 316 U.S., at 580-581. The Court did not hold, however, that the "regular rate" could not be otherwise established, even in regard to employees of private concerns. Rather, in *Walling* v. *Belo Corp.*, 316 U.S. 624 (1942), decided on the same day as *Missel*, the Court upheld the specification in an employment contract of the portion of a weekly salary that represented the hourly "regular rate" of the employees, where that rate exceeded the statutory minimum. It "is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract." 316 U.S., at 631. And, the fact that under this method of computation the overtime component of the weekly wage exceeded that required by the FLSA was not improper since "the Act does not prohibit paying more. . . ." 316 U.S., at 632.

We think it even more clear that the FLSA does not prohibit a State from "paying more" to its own employees by virtue of State laws regulating the employment of those employees. From the very beginning, Section 18 of the FLSA has provided that "[n]o provision of this Act or of any order thereunder shall excuse noncompliance with any . . . State law . . . establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act. . . ." 29 U.S.C. § 218 (a). The court below (Pet. App. A, at 20-21) quoted at length and relied upon the opinion in *State* v. *Comfort Cab, Inc.*, 118 N.J. Super 162, 286 A.2d 742 (1972), which concluded, *inter alia*, that by reason of Section 18 of the FLSA "it is clearly the intent of the Congress that

a lower state maximum hour regulation, creating a
overtime arrangement more favorable to the employe
than that contained in [29 U.S.C.] § 207 of the federa
act, should prevail." 286 A.2d, at 748.

Eastern Sugar Associates v. *Pena,* 222 F.2d 93
(1st Cir., 1955), cert. den., 350 U.S. 900 (1955), per
haps is even more directly in point. That case sustaine
the application of a Puerto Rico statute "more favor
able to the employee than the Federal act in that i
provides that the guaranteed weekly wage is to b
divided by the number of 'regular hours' worked, i
this case 40, instead of by the actual number of hour
worked, in determining the 'rate agreed upon fo
regular hours' which is the basis for computing tim
and a half for extra hours worked." 222 F.2d, at 93
In so holding, the Court of Appeals quoted the per
tinent portion of Section 18 of the FLSA and state
that: "Thus, the States, and this undoubtedly include
the Commonwealth of Puerto Rico, are given freedo
of action to establish higher standards than thos
established by the Federal act." 222 F.2d, at 936. Se
also, *C. Brewer Puerto Rico, Incorporated* v. *Corchad*
303 F.2d 654 (1st Cir., 1962).

While the *Comfort Cab* and *Pena* cases involve
State wage and hours laws, for present purposes ther
is no difference in principle between such laws and th
Montana laws establishing for State employees a mor
favorable "regular rate" of pay for purposes of Se
tion 7(a) of the FLSA than is required by that Ac
The important point is that under Section 18 of th
FLSA a State may, in the words of *Comfort Ca*
create "an overtime arrangement more favorable
the employee than that contained in" Section 7(a
of the FLSA or, in the words of *Pena,* "establi

higher standards than those established by the Federal act."

The petition makes no reference to Section 18 of the FLSA or to the decisions thereunder, other than to note that the court below cited *Comfort Cab* as authority (Pet., at 7), and thus makes no effort to demonstrate that the court below erred in relying upon Section 18 as so construed. The *Missel* decision and the lower court decisions following *Missel,* relied upon by petitioner, did not involve the application under Section 18 of State laws more favorable to the employees than the requirements of the FLSA. Hence, even if *Missel* had held—which it plainly did not—that arrangements made by private employers with their employees cannot provide for more overtime compensation than is required by the FLSA, that decision would not conflict with the decision below.

We submit, therefore, that the decision below is clearly correct and does not conflict with the *Missel* decision or, insofar as we are aware, with any other decision of this Court or of the lower courts. This case basically turns upon the application of constitutional and statutory provisions of the State of Montana, and does not involve any issues of general importance under federal law. Even as to employees of the Montana Department of Institutions, the significance of this case is limited to the respondents for the two-year period between February 1, 1967 and January 31, 1969. It was only in regard to those employees that petitioner failed to pay the overtime compensation required, after the FLSA was made applicable to employees of State institutions effective February 1, 1967, and petitioner has voluntarily compensated employees of the Montana Children's Center since Febru-

ary 1, 1969 on the basis subsequently adopted by the courts below for the two-year period in question. Plainly, therefore, this is *not* a case where, in the language of this Court's Rule 19, "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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